1990

State of Utah v. Johnny Medina Duran : Reply Brief

Utah Court of Appeals

Elizabeth Holbrook; Salt Lake Legal Defender Association; Attorney for Appellant.
R. Paul Van Dam; Attorney General; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
JOHNNY MEDINA DURAN,	:	Case No. 900022-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from an order denying Mr. Duran's motion to dismiss the habitual criminal charge, which order preceded the entry of conditional guilty pleas, judgments and convictions for two counts of unlawful distribution of a controlled substance, second degree felonies, in violation of Utah Code Ann. section 58-37-8(1)(a)(ii), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leonard H. Russon, Judge, presiding.

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SUMMARY OF ARGUMENT

Fairness requires a decision on the merits in this case.

This conditional appeal is not interlocutory. The State's argument that this Court has no jurisdiction over this case because it is an interlocutory appeal is incorrect. This case involves a conditional appeal, which under State v. Sery, 758 P.2d 935, 939 (Utah Ct. App. 1988), is not considered interlocutory.

The plea was conditional. As the record in the trial court bears out, Mr. Duran pled guilty to the distribution charges because he believed that, if he is successful in reversing the trial court's denial of his motion to dismiss the habitual criminal charge, he will return to stand trial on the distribution charges without risking a life sentence under the improperly charged habitual criminal statute.

After Mr. Duran's counsel articulated the prosecutor's understanding of the conditional nature of the plea, the prosecutor said nothing. The State is too late now to contest the conditional nature of Mr. Duran's plea.

Although the trial court expressed some doubt as to whether this Court would hear an appeal relating to the dismissed habitual criminal charge, the trial court heard Mr. Duran's understanding of the plea and accepted Mr. Duran's plea.

This appeal is not moot and was not waived. The mootness doctrine, requiring a litigant to be affected by judicial determinations, does not bar Mr. Duran's appeal because his plea was conditional. The conditional nature of the plea also vitiates the State's waiver arguments.

The threat of the life sentence posed by the habitual criminal conviction induced Mr. Duran to plead guilty to distribution of controlled substances. The dismissal of the habitual criminal charge after Mr. Duran pled guilty does not dissipate the coercive and injurious impact of the habitual criminal charge. If the conditional plea understood by Mr. Duran is honored, as it should be, and he is eventually allowed to defend against the distribution charges without the threat of the life sentence posed by the habitual criminal charge, his rights will be affected by this appeal.

In the event that this Court needs to reach the question, this Court should reject the State's argument that conditional appeals are permitted only in cases where the issues on appeal are "dispositive." Such a rule is inconsistent with Utah's constitutional rights to appeal, and with the history of conditional appeals in Utah. The dispositive conditional appeal rule is not applied strictly in jurisdictions that have adopted the rule, and

the policy reasons behind the dispositive conditional appeal rule do not call for its application under the facts of this case.

ARGUMENT

I.
THIS COURT HAS JURISDICTION OVER THIS APPEAL.

The State repeatedly characterizes this appeal as interlocutory, and argues that under Utah Code Ann. section 77-18a-1 (Supp. 1990) and Utah Rule of Appellate Procedure 5(e), this Court may dismiss this appeal for want of appropriate procedure invoking this Court's interlocutory appeal jurisdiction. Appellee's brief at 1 and n.1, 2, and 9.

While Mr. Duran unsuccessfully sought leave of the trial court for interlocutory review of the trial court's failure to dismiss the habitual criminal charge (T.2 11-13), that motion for an interlocutory appeal does not transform this appeal into an interlocutory appeal.

If the State is arguing that conditional appeals are interlocutory and must follow the procedural rules for interlocutory appeals, the State is incorrect. In State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988), this Court explained as follows:

> It is true that a conditional plea reserving a suppression issue for appeal does not have the complete finality of an unconditioned plea, but it still results in a judgment of conviction, not an interlocutory order. That judgment is as final as any conviction after trial that might be reversed on direct appeal.

Id. at 939.

This Court's jurisdiction over this appeal is provided by Utah Code Ann. section 78-2a-3(2)(f), which grants appellate jurisdiction over "appeals from district court in criminal cases, except those involving a conviction of a first degree or capital felony."[1]

II.
THE PLEA WAS CONDITIONAL.

The State contends that the record in this case reflects an unconditional plea, stating, "The remarks of the trial court and counsel in connection with the plea bargain clearly show that the State, and more especially the trial court neither agreed nor accepted a conditional plea, if, in fact, the State actually offered such." Appellee's brief at 6 (emphasis added). Such statements must be evaluated with care.[2]

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1. Appellate counsel for Mr. Duran, Elizabeth Holbrook, erroneously indicated in the initial Statement of Jurisdiction that this Court's jurisdiction is provided by "Utah Code Ann. section 76-2a-3(2)(e) (jurisdiction over criminal convictions less than first degree felonies)." Appellant's brief at 1. Subsection (e) refers to interlocutory appeals, while subsection (f) refers to jurisdiction over criminal convictions less than first degree felonies, and should have been cited. Counsel for Mr. Duran has made the same error in numerous other appeals from final orders, e.g. State v. Kendall Northern, Case No. 900565-CA, and regrets any contribution this may have had in the State's incorrect jurisdictional argument in this case.

2. To the knowledge of Mr. Duran's appellate counsel, the attorney general and the trial prosecutor currently both maintain that the plea in this case was unconditional. Mr. Duran, his trial counsel, Mary Corporon, and his appellate counsel maintain that the plea in this case was conditional.
See State v. McIntire, 93 Utah Adv. Rep. 19 (Utah Ct. App.
(footnote continues)

In the trial court, Mr. Duran's trial counsel clearly articulated the understanding of the prosecutor that the plea was conditional, "Your Honor, I also wanted to indicate for the record, one final aspect of the agreement I had with counsel, and I believe she understood I would be specifically reserving on the record the issue of our Motion to Dismiss Count 3 of the Information and the legal issues raised regarding the habitual criminal statute, and it will be my intention to reserve those for appellate review." (T.2 65-66) (emphasis added).

The prosecutor did not dispute defense counsel's characterization of the prosecutor's understanding of the conditional nature of the plea. Id.

The State should be bound by the record as it stands, establishing that the prosecutor and Mr. Duran intended the plea to be conditioned on his right to appeal the habitual criminal statute issues. See State v. Copeland, 765 P.2d 1266, 1274 (Utah 1988)(defense counsel characterized plea agreement between defense

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(footnote 2 continued)
Oct. 17, 1988)(defense counsel stated at oral argument that plea was unconditional); State v. McIntire, 768 P.2d 970, 971 and n.2 (Utah Ct. App. 1989)(defense counsel established on rehearing that plea was conditional); State v. Bobo, 131 Utah Adv. Rep. 25, 25-26 and n.1 (Utah Ct. App. 1990)(relying on assertion of assistant attorney general, this Court found that plea was unconditional); State v. Bobo, 149 Utah Adv. Rep. 67, 68 (Utah Ct. App. 1990)(relying on subsequent affidavit of trial court submitted by defense counsel on rehearing, this Court found that plea was conditional); State v. Geer, 765 P.2d 1, 2-3 (Utah Ct. App.), cert. denied, 773 P.2d 45 (Utah 1989)(this Court rejected State's claim that appeal was waived by entry of conditional guilty plea); State v. Sery, 758 P.2d 935, 937 (Utah Ct. App. 1988)(prosecutor assented to conditional plea on record in trial court; on appeal, State contended that conditional plea was improper and mistaken).

and State; counsel for the State did not object; "creating the inference" that defense counsel's characterization of the bargain was correct); State v. Kay, 717 P.2d 1294, 1306 (Utah 1986)(if State disagrees with proposed plea agreement, State should object).

While the trial court disputed whether this Court would hear an appeal on the issues involved in the habitual criminal count because that count has been dismissed (see discussion in Point II, establishing that the mootness concerns expressed by the trial court are not applicable in the context of this conditional plea), the court first heard Mr. Duran's understanding of the conditional nature of the plea, and then accepted the plea. The court stated,

> They have been dismissed. . . . They will never hear it. The State has dismissed it, but you can make a record on that, if you want. . . . You have a right to do what you want, but if it is dismissed there is nothing to appeal there is no issue. . . . If there is anything to appeal, and I don't know if Mr. Duran would want you to appeal it. What if you lost? . . . You don't need to say anything, Mr. Duran. That is on the record. Whatever you do, you do. Since it is dismissed, there is not that issue facing Mr. Duran or the issue before the Court.

(T.2 66) (emphasis added).

While Mr. Duran's counsel acknowledged the trial court's concerns about whether this Court would hear the appeal, nothing in the record contradicts Mr. Duran's, trial counsel's, and the prosecutor's understanding that the plea was conditional. The trial court allowed this record to be created, and accepted the plea.

If, as the State contends, the trial court did not accept the conditional plea, the trial court would have called upon

Mr. Duran to withdraw the plea. Utah Rule of Criminal Procedure 11(8)(b) and (c) (1990) provide,

> (b) When a tentative plea agreement has been reached that contemplates entry of a plea in the expectation that other charges will be dropped or dismissed the judge, upon request of the parties, may permit the disclosure to him of the tentative agreement and the reasons for it, in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether he will approve the proposed disposition.
>
> (c) If the judge then decides that final disposition should not be in conformity with the plea agreement, he shall advise the defendant and then call upon the defendant to either affirm or withdraw his plea.

The trial court's acceptance of Mr. Duran's maintained intent to appeal the habitual criminal issues, and refraining from calling on Mr. Duran to withdraw the plea demonstrate that the trial court accepted the conditional plea.

If this Court were not in agreement that the record establishes that the plea was conditional, this Court presumably could remand this case for a hearing on the conditional nature of the plea. Particularly because the October 17, 1989, hearing in this case preceded this Court's decision in State v. Bobo, 131 Utah Adv. Rep. 25 (Utah Ct. App. March 19, 1990)(clarifying the requirement to make an explicit record of the conditional plea), this Court should act in the interest of judicial economy and decide the merits of the habitual criminal issues raised by Mr. Duran. See People v. O'Neal, 421 N.W.2d 662, 664 (Mich. App. 1988)(court decided merits in interest of judicial economy, rather than

remanding to lower court on issue of conditional nature of the plea); State v. Moore, 577 A.2d 348, 349 (Me. 1990)(same).

III.
THE APPEAL IS NOT MOOT AND WAS NOT WAIVED.

The State contends that Mr. Duran's appeal of the habitual criminal charge is moot because the habitual charge was dismissed in the plea bargain--he received "precisely the relief that [he] sought when he first moved to have that charge dismissed." Appellee's brief at 7.

Mr. Duran did not receive precisely the same benefit in having the habitual criminal charge dismissed after he pled guilty to the distribution charges. If the trial court had dismissed the habitual criminal charge prior to trial, Mr. Duran could have defended against the distribution charges without risking the life sentence attendant to the habitual criminal conviction. Mr. Duran is currently serving a sentence in the Utah State Prison for the distribution convictions, which convictions he intends a jury to determine in the event that this Court agrees that the habitual criminal count was improperly charged in this case. Mr. Duran's undefended distribution convictions are a continuing injury to Mr. Duran.

If this Court allows Mr. Duran's conditional plea to be honored and agrees that the habitual criminal charge is not proper in this case, this Court will "affect the rights" of Mr. Duran by allowing him to defend against the distribution charges. The

State's mootness argument, thus, does not apply to Mr. Duran's conditional plea. See Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989)(mootness doctrine is a discretionary doctrine used when appellate decisions would not affect the rights of the litigants).

As shown by State v. Tebbs, 786 P.2d 775 (Utah Ct. App. 1990), Mr. Duran's reliance on conditional nature of the plea is further reason to reject the discretionary mootness doctrine in this case. In Tebbs, the defendant entered a conditional no contest plea to two counts of communications fraud, reserving the right to challenge the constitutionality of the communications fraud statute. Id. at 776-777. Prior to addressing the merits of the issue, this Court voiced skepticism that the defendant had standing to challenge the statute, because his argument was based on the statute's placing the burden of proof on the defendant, and he did not make any effort to meet that burden of proof in the trial court. Id. at 777. After explaining this Court's concerns about the defendant's standing, this Court decided to reach the merits of the issue, explaining in footnote 4:

> Our decision to reach the merits is prompted by the likelihood that defendant's perceived ability to pursue the issue on appeal was critical to his decision to enter a no-contest plea, which also probably explains why the state chose not to raise the standing issue.

While the standing doctrine of Tebbs differs from the mootness doctrines in this case, both doctrines are discretionary. While the State did not raise the standing issue in Tebbs, but raises the mootness doctrine in this case, Mr. Duran, like

Mr. Tebbs, relied on the understanding that he could have an appeal on the merits in entering the conditional plea. If the mootness doctrine could properly apply in this case, this Court should follow Tebbs and exercise its discretion to reach the merits of the case.

The State's closely related waiver argument, Appellee's brief at 8-12, is also inapposite because Mr. Duran's plea was conditional. The State argues that "A voluntary guilty plea is a waiver of the right to appeal all non-jurisdictional issues." Appellee's brief at 8. While this axiom is correct, it does not apply to cases involving conditional pleas. State v. Sery, 758 P.2d 935, 938 (Utah Ct. App. 1988). Even if the waiver doctrine did apply in the context of conditional pleas, because the State could not have proceeded properly against Mr. Duran with the unsupportable habitual criminal charge, the issue is like a jurisdictional issue and cannot be waived. Cf. People v. Reid, 362 N.W.2d 655, 659 (Mich. 1984)(extending jurisdiction exemption of waiver doctrine to include defects which do not relate to guilt or innocence, but indicate that there should not have been a prosecution); id. at 663 (Ryan, J., dissenting)(discussing case law to the same effect).

IV.
THIS COURT SHOULD NOT APPLY OR ADOPT A "DISPOSITIVE ISSUE" CONDITIONAL APPEAL RULE.

The State contends that Mr. Duran's conditional appeal should not be heard because a decision on the merits would not be dispositive of the case. Appellee's brief at 12-14. A dispositive issue rule would be inconsistent with the right to appeal protected

by the Utah Constitution, and with traditional appellate practice in this state.

The right to appeal is guaranteed not once, but twice, by the Utah Constitution. Article I section 12 provides, in part, "In criminal prosecutions the accused shall have the right ... to appeal in all cases." Article VIII section 5 provides, in part, "Except for matters filed originally with the supreme court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause." These constitutional provisions speak in absolute terms, and limiting appeals to "dispositive" issues would contravene these constitutional provisions.

A "dispositive issue" rule would also be inconsistent with appellate procedure in Utah. While this Court has set forth explicit standards on the entry of conditional pleas, e.g. State v. Bobo, 131 Utah Adv. Rep. 25 (Utah Ct. App. 1990), counsel for Mr. Duran is unable to find one conditional plea case from this Court or from the Utah Supreme Court applying a "dispositive issue" rule. While Sery does refer to other authorities applying a "dispositive issue" rule, State v. Sery, 758 P.2d 935, 938-939 (Utah Ct. App. 1988), there is nothing in Sery indicating that the issue decided on the merits by this Court was dispositive. See Sery, 758 P.2d at 947 ("The order of the trial court denying defendant's suppression motion is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion."). In Utah, even traditional appeals from final orders are

frequently not dispositive. See e.g. State v. Sampson, 143 Utah Adv. Rep. 12 (Utah Ct. App. 1990)(reversing conviction and remanding for possible retrial); State v. Sampson, 154 Utah Adv. Rep. 23 (Utah Ct. App. 1991)(recognizing district court's jurisdiction to release Mr. Sampson pending further proceedings on appeal); State v. Sampson, 156 Utah Adv. Rep. 4 (Utah Ct. App. 1991)(supplementing initial opinion, maintaining the need for remand for possible retrial).

The policy reasons for a "dispositive issue" rule do not call for its adoption in this case. In Everett v. State, 535 So.2d 667 (Fla. App. 2 Dist. 1988), the court explained the purposes behind its "dispositive issue" rule:

> First it enhances the likelihood that a meritless appeal will not be pursued, and second, it pretermits the potentially misleading formation of a belief in the defendant that relief from the judgment and sentence can be achieved in the appellate court. Moreover, and as a corollary to the foregoing, it would insure a timely opportunity for the defendant to evaluate withdrawal from the plea agreement.

Id. at 669.

While these policy reasons may be legitimate, in Utah, criminal defendants are represented by attorneys at trial and on appeal. Attorneys are able and ethically obligated to serve the policy reasons underlying the dispositive issue rule. There is no need for the rule.

The policy reasons behind the "dispositive issue" rule would not be impacted adversely by this Court's decision on the merits in this case. Mr. Duran's appeal is not meritless.

Mr. Duran wants the opportunity to defend against the distribution charges, and is not under any impression that success on this appeal will automatically obviate the distribution charges. Mr. Duran does not want to withdraw from the conditional plea agreement he made with the prosecutor.

If this Court were to adopt a "dispositive issue rule," it should not be applied in this case because Mr. Duran had no notice of such a requirement. See Wright v. State, 547 So.2d 258, 260 (Fla. App. 1 Dist. 1989)(dispositive issue rule applied only in cases following decision putting defendants on notice of the rule). Even if a "dispositive issue" rule were published in this jurisdiction prior to the hearing in this case, judicial economy would call for a decision on the merits. See Harrison v. State, 791 P.2d 359, 360 n.1 (Alaska App. 1990)(court addressed the merits of the issue despite the fact that the dispositive issue rule was not met in order to conserve the parties' resources).

CONCLUSION

This Court should reach the merits of this case.

Respectfully submitted this 22 day of April, 1991.

ELIZABETH HOLBROOK
Attorney for Mr. Duran

CERTIFICATE OF MAILING

I, Elizabeth Holbrook, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals and that four copies of the foregoing will be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 22 day of April, 1991.

ELIZABETH HOLBROOK

DELIVERED by _____ this _____ day of April, 1991.

_____